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No. 87-965

In The
Supreme Court of the United States
October Term, 1987

CITY OF SAN ANTONIO,

Petitioner,

vs.

JEAN ROSOW,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner has failed to invoke the jurisdiction of this Court, and has failed to raise a substantial federal question. However, Respondent submits that the controlling question of this case may be presented as follows:

> Whether there is a violation of the state and federal due process rights of a classified civil service employee where the City Manager disregards the recommendations of the Civil Service Commission by summarily terminating the employee without reviewing the record or evidence compiled before the commission, and without affording the employee the right to confrontation.

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JURISDICTION

The Petitioner has failed to invoke the jurisdiction of this Court by citing only 28 U.S.C. § 2101(c), a non-jurisdictional statute. The jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) may not be invoked by Petitioner because the Supreme Court of the State of Texas decided this case not on the basis of any federal question, but on

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the grounds of multiple procedural defaults and omissions committed by the Petitioner in the trial court.

STATEMENT OF THE CASE

The Petitioner's statement regarding the course of proceedings and review of facts contains numerous inaccuracies and omissions. Rather than correcting these errors individually, Respondent adopts and incorporates by reference the statement contained in the opinion of the Texas Supreme Court. *Rosow v. City of San Antonio*, 734 S.W.2d 659 (Tex. 1987).

REASONS FOR DENYING THE WRIT

1. Petitioner failed to raise a substantial question of federal law.

The first question presented by Petitioner has been repeatedly decided by this Court, and is a matter of settled federal law. As this Court has stated in the past regarding 42 U.S.C. § 1983.

> As introduced and enacted, it serves only to insure that an individual has a cause of action for violations of the constitution which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by Section 1 of the 1966 Act.

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 60 L.Ed.2d 508, 99 S.Ct. 1905 (1979). Section 1983 merely provides a remedy by authorizing a cause

of action. Respondent sought the remedy provided by § 1983 for the unconstitutional deprivation of her vested property interest and expectation of continued employment. *Rosow v. City of San Antonio*, 734 S.W.2d at 660; City Charter of San Antonio, Rule XVII, § 1, § 3.

Petitioner has consistently and erroneously characterized Respondent's cause of action as an appeal from an administrative decision rather than as an original action for the deprivation of her constitutional right to due process. *City of San Antonio v. Rosow*, 716 S.W.2d 663, 635 (Tex. App.—Corpus Christi 1986), *rev'd* 734 S.W.2d 659 (Tex. 1987). The focus of these causes of action are separate and distinct, as are the standards of review applicable to them. In Texas, an appeal from an administrative agency is subject to "substantial evidence de novo review" which denies the litigant a trial by jury. Reversal of the administrative decision requires that no reasonable mind could fail to differ with the decision. *See* Reavely, *Substantial Evidence and Insubstantial Review in Texas*, 23 S.W.L.J. 239 (1969). It is a narrow inquiry into the factual sufficiency of the administrative decision.

In contrast, the thrust of the Respondent's case was directed towards the procedures used in her discharge by the City Manager.

> The gravamen of Rosow's complaint was that she was denied procedural due process because she was not afforded an opportunity to present her side of the evidence before the ultimate decision maker, Huebner. Her pleadings frame the cause of action as an original action based on an unconstitutional deprivation actionable under 42 U.S.C. § 1983.

Rosow v. City of San Antonio, 734 S.W.2d at 660.

The liability issue submitted to the jury in this action contained the words "arbitrary and capricious." (Tr. 34). The Petitioner claims that the term "arbitrary and capricious" is the same as "not supported by substantial evidence." Petition for Certiorari, page 9, *citing Gerst v. Guardian Savings*, 434 S.W.2d 113 (Tex. 1969); *Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984); *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1972); *Green v. Board of Regents of Texas Tech University*, 474 F.2d 594 (5th Cir. 1973). None of these cases support the Petitioner's contention.

Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 454, cited by Petitioner, in fact reaches the opposite conclusion.

> In *Lewis v. Metropolitan Savings & Loan Association*, 550 S.W.2d 11 (Tex. 1977) [w]e held that instances may arise in which the agency's action is supported by substantial evidence, but is arbitrary and capricious nonetheless. One such instance is when a denial of due process has resulted in the prejudice of substantial rights of a litigant.

Petitioner has not argued, nor could it argue, that as a matter of federal law, Respondent was entitled only to substantial evidence de novo review. Substantial evidence review is a creature of Texas law. *See, e.g., City of Amarillo v. Hancock*, 239 S.W.2d 788 (Tex. 1951). The Texas Supreme Court rejected the substantial evidence review standard in Respondent's cause of action.

> We hold that the court of appeals erred ar characterizing [petitioner's] § 1983 claim as an appeal from an administrative decision and accordingly reverse the

> judgment of the Court of Appeals and affirm the judgment of the trial court.

Rosow v. City of San Antonio, 734 S.W.2d 659 (Tex. 1987). Accordingly, the Texas Supreme Court did not hold that § 1983 changed the applicable substantive and procedural law, as Petitioner contends, but rather held that the substantial evidence rule was not applicable in this case.

Finally, the petition should be denied because the decision of the Texas Supreme Court rests solely upon independent state procedural grounds. The Texas Supreme Court never reached the substance of the Respondent's § 1983 claim because the Petitioner failed to preserve the error it now raises.

> Testimony developed during trial in support of her § 1983 claim was received without objection by the City. Indeed, the record before us demonstrates that no objections were made by the City to either the pleadings, the evidence or the issue and instructions submitted to the jury and that the City first complained or gave notice of its contentions in its Motion for Judgment N.O.V.

Rosow v. City of San Antonio, 734 S.W.2d at 660.

> Thus, the Court of Appeals erred in characterizing Rosow's suit as an administrative appeal and in failing to review this case as a § 1983 claim. However, because the City has failed to preserve the right to complain of the trial court's judgment based on Rosow's § 1983 claim, such judgment must stand.

Rosow v. City of San Antonio, 734 S.W.2d at 661. The basis for the Texas Supreme Court's decision was reinforced by a concurring opinion by Justice Spears, joined in by Justices Wallace, Robertson, and Mauzy:

> Rosow pleaded her case under 42 U.S.C. § 1983 and presented evidence in support of that claim. - The jury found for Rosow on her § 1983 issue. The City failed to object to any of these actions. . . . these were not preserved for review by the City.

Rosow v. City of San Antonio, 734 S.W.2d at 661.

Respondent has diligently searched the Petition for a meritorious reason for granting Writ of Certiorari. On page 7, the Petitioner may be attempting to argue that there is a conflict between the decision of the Texas Supreme Court in the instant case and prior Fifth Circuit cases construing 42 U.S.C. § 1983. The cases cited by Petitioner reveal no such conflict. In *Duke v. North Texas State University,* 469 F.2d 829 (5th Cir. 1973) a panel of the Fifth Circuit reversed an order granting a preliminary injunction reinstating a University teaching assistant. *Duke v. North Texas State University,* 338 F.Supp. 900 (E.D. Tex. 1971). The Fifth Circuit found that since Duke had been afforded due process, it was therefore necessary to grant school authorities the deference they are customarily afforded upon review of the factual sufficiency of their actions. The other case cited by Petitioner in an apparent attempt to raise conflict, *Green v. Board of Regents of Texas Tech University,* 474 F.2d 594 (5th Cir. 1973), was a § 1983 case which was tried as a bench trial. *See Green v. Board of Regents of Texas Tech University,* 335 F.Supp. 249 (N.D. Tex. 1971). There is no indication that Green requested trial by jury, and consequently the case was reviewed under the familiar standards imposed by FED.R.CIV.P. 52(a). Neither case stands for the proposition that the Fifth Circuit has ever applied the substantial evidence rule to a case in which there was a prima facie showing of a

denial of procedural due process. In contrast, *Davis v. West Community Hospital,* 755 F.2d 455 (5th Cir. 1985), which the Texas Supreme Court cited in its opinion, stands for the proposition that a litigant is entitled to trial by jury in a § 1983 action in which evidence developed before a hearing committee was disregarded by an ultimate decision maker.

2. The burden was upon the Petitioner to show that there was no causal relation between the constitutional violation and the Respondent's damages.

The Petitioner claims, for the first time in this Court, that the burden was upon Respondent to obtain a finding that the due process violations were a cause in fact of her damages. For this proposition Petitioner cites *Carey v. Piphus,* 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978). In fact, *Carey* cast the burden upon the Petitioner-Defendant of obtaining an affirmative finding that there was no cause in fact relation between the constitutional violation and the plaintiff's damages, i.e., that the Respondent would have been fired even if she had been afforded her consitutional rights. *Carey v. Piphus,* 435 U.S. at 260. *See also, Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274, 285-287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). The failure of Petitioner to previously raise this contention before the trial court, the court of appeals or the Texas Supreme Court clearly constitutes a waiver. Since the appropriate procedure would have been for the Petitioner to have requested a jury issue and instruction at trial its abject failure to do so resolves the issue before this Court purely on the basis of Texas procedural law. Rule 279, Tex.R. Civ.P.

The Petitioner has confused its own burden of establishing that there was no cause in fact relation between the constitutional violation and the Respondent's damages with the Respondent's true burden of proving actual damages. Petitioner now contends that Respondent failed to establish that injury resulted from her constitutional violations, despite the fact that the Petitioner *stipulated* that Respondent's actual damages amounted to $131,581.66. (Plaintiff's Ex. 40). The Respondent proved additional damages, and the jury awarded her the total amount of $150,000, plus attorney's fees. In this regard, the Texas Supreme Court stated:

> Rosow was unquestionably deprived of that [vested property right, in her job and an expectation of continued employment] which she contended was effected in violation of her right to procedural due process.

Rosow v. City of San Antonio, 734 S.W.2d at 661.

Petitioner waived the right to complain of the omission of a jury issue inquiring as to whether Respondent would have been discharged even if her constitutional right to due process had been provided by the city. *See Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955). The Texas Rules of Civil Procedure require that the party bearing the burden of obtaining an affirmative finding on a defensive issue submit the issue to the trial court judge in substantially correct term. Rule 277-279, Tex. R. Civ. P. The failure to submit a question to the jury is not grounds for complaint unless the complaining party requested in writing the submission of the question. *Id.* In contrast, an omitted *element* of liability is deemed *found* if there is evidence to support it. Rule 279, Tex. R. Civ. P.

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Respondent presented evidence of constitutional violations and resulting damages. The jury returned a verdict finding that the City Manager of the City of San Antonio had acted arbitrarily and capriciously, and awarded her damages in the amount of $150,000. Petitioner neither requested nor objected to the submission of any special issue to the jury. The duty to request an issue inquiring as to whether Petitioner would have been discharged absent violations of her civil rights was that of the Petitioner, as a matter of both Texas law and prior holdings of this Court.

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CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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